

Treasury Submission: Non-competes and other restraints

By: Operation Redress Pty Ltd

Who We Are

We are researchers and advocates who have helped expose systemic wage theft (7-Eleven^{1 2}, Domino's Pizza³, etc.), systemic issues in the franchising sector (Retail Food Group [Brumby's Bakery, Crust Pizza, Donut King, Michel's Patisserie]⁴, Mortgage Choice⁵, etc.), fee gouging with Australia's largest toll road operator Transurban^{6 7 8}, and systemic issues in Australia's cosmetic surgery industry^{9 10}.

Non-Compete Clauses

Our work and advocacy in the franchising sector and assisting those who have experienced underpayment in all parts of the workforce means we are aware of concerning themes that are not always the predominant issue or angle of our research and advocacy. This means we have not necessarily done deep investigative research on these issues.

Non-compete clauses are one such issue which we have not focused on in any significant way but are aware their existence causes issues in the franchise sector and the cosmetic injectables industry.

Franchise Sector

We have viewed an employment agreement of a worker employed by a franchisee who had non-compete clauses. This franchise brand has over ten locations in Australia, with more opening. The following is the non-compete clause in question:

From the date your employment ends, you agree not to engage or prepare to engage in a business that competes with the business of the Employer or any Associated Entities for the duration of the Restraint Period within the Restraint Area.

This non-compete clause renders the employees unable to work in the same industry for the Restraint Period in the Restraint Area. The Restraint Period was 3-12 months after their employment ended, and the Restraint Area was up to 50km.

¹ <https://www.abc.net.au/4corners/7-eleven-promo/6729716>

² <https://www.smh.com.au/interactive/2015/7-eleven-revealed/>

³ <https://www.smh.com.au/interactive/2017/the-dominos-effect/>

⁴ <https://www.smh.com.au/business/companies/cup-of-sorrow-the-brutal-reality-of-australias-franchise-king-20171207-h00l.html>

⁵ <https://www.franchisebusiness.com.au/media-spotlight-shines-on-mortgage-choice-and-its-remuneration-model/>

⁶ <https://www.choice.com.au/transport/cars/fines/articles/road-toll-costs-and-fines>

⁷ <https://www.abc.net.au/news/2018-03-20/how-does-a-road-toll-debt-get-to-200000-dollars/9555960>

⁸ <https://www.9news.com.au/national/tolls-ombudsman-calls-for-better-system-to-deal-with-driver-complaints/5a1a4e9f-547d-498b-a61c-c29e1f09e145>

⁹ <https://www.abc.net.au/4corners/cosmetic-cowboys/13603636>

¹⁰ <https://www.smh.com.au/business/consumer-affairs/how-the-cosmetic-cowboys-ran-free-on-the-wild-west-of-social-media-20211028-p593vc.html>

This is obviously significantly problematic for these employees if this is enforced, as they are potentially required to travel over 50km for 12 months to work a minimum-wage Industry Award job. This makes it harder for them to find an employer who would hire them knowing they live so far away.

This also prevents the worker from moving to a better place of employment with more benefits or better pay while they are still employed, or if they have a falling out with their employer, have concerns around the way the business is conducted, want to whistleblow, are made redundant, or are fired, they are unable to get another job in the industry for up to a year, without travelling significant distances.

The majority of non-compete clause complaints we have received in the franchise sector are around franchisees being prevented from working or establishing a business in the industry after leaving the franchise or selling their store. In one case, a franchisee claimed their franchisor restrained them from ever working (even as an employee) in their industry ever again (whether this is legally enforceable is a different story, but this is what some franchisees have been made to believe).

Some workers of franchisees are impacted by what is in a Franchise Agreement, which they do not sign or are even necessarily privy to. Some Franchise Agreements prevent workers (or even contractors/suppliers) of a franchise brand from being hired by a business if a former franchisee is involved in it. The following examples reflect this, and are from Franchise Agreements in the financial services and fitness industries:

Example A

For the purpose of clause [REDACTED] "Restricted Activities" means: soliciting, employing or engaging any person who is, or who has been in the twelve (12) months before the expiration or termination of this Agreement, employed or contracted by the Franchisee in the Business, by the Franchisor, or by any other [REDACTED] franchisee, without first obtaining the Franchisor's written consent, whether or not that person would commit any breach of that person's contract of employment;

Example B

During the Restraint Period the Franchisee and the Guarantors (in any capacity including on its own account or as a member, shareholder, unitholder, director, partner, joint venturer, employee, trustee, beneficiary, principal, agent, adviser, contractor, consultant, manager, associate, representative or financier or in any other way or by any other means) jointly and severally covenant that, during the Restraint Period they will not directly or indirectly:

solicit, canvas, approach or accept an approach from any person who is at the End Date or was at any time in the twelve (12) months prior to that date, a member or supplier of the Franchised Business with any purpose of, or having the effect of, obtaining the custom or services of that person in a Restrained Business;

induce or assist in the inducement of any employee within the Franchised Business to leave that employment.

We have more examples of Restraint Clauses in Franchise Agreements but have only included two.

Cosmetic Surgery and Injectables

Non-compete clauses in the cosmetic surgery and injectables industry are especially problematic given the fact that these services are regulated health services where poor patient care can lead to poor outcomes, temporary and permanent injuries, psychological distress, permanent blindness, and death. Registered healthcare professionals have an obligation to make a mandatory notification to the health regulator if they see something in their workplace or the medical sector that breaches professional standards or duties of care. This situation becomes complex if a nurse wants to make a mandatory notification to the regulator about the clinic but is impacted by a non-compete clause and cannot work elsewhere in the industry for a period of time.

Unfortunately, we have anecdotally heard that these non-compete clauses do exist in the injectables industry.

Training Fees

Nurses who are starting out in the injectables industry will often be employed by a clinic and work under the guidance of a more experienced nurse or doctor. While as far as we know, this more experienced nurse or doctor does not provide certifiable or official training to the new nurse, they do provide them with some form of on-the-job training.

We have heard that if this nurse quits or resigns from the clinic within a certain timeframe, they must pay what is classed as a “training fee” and is often thousands of dollars. We are unsure if this fee is payable even if they want to leave the industry and work elsewhere in the sector, such as in hospitals.

If so, this is deeply problematic given nursing shortages in hospitals¹¹, and the potential for the cosmetic injectables industry to essentially hold nurses captive to the industry unless they pay thousands of dollars or remain at the clinic for a certain time period. Further investigation is needed to determine if this is the case.

Given nurses may be faced with this fee if they leave, we also hold concerns over whether nurses are less likely to report misconduct of their colleagues or boss to the health regulator, become a whistleblower on poor practice, or leave the clinic if they feel it has poor patient outcomes. Not feeling able to do this without risk of paying the training fee for leaving has an obviously detrimental effect to the safety of the industry.

There are also likely economic issues which fall outside of our expertise and focus.

Non-competes and other restraints

Other nurses have shared how when they left their place of employment to establish and operate their own clinic, they were threatened with a lawsuit by their former employer. Restraint of trade clauses in these contracts prevent competition in the cosmetic injectables space, which can further threaten an industry already in a state of reform due to significant issues around poor patient outcomes, safety concerns, and glamourisation of the industry.

Final Word

While there may be a very restricted need for non-compete and similar clauses, we do encourage a stamping out of businesses abusing their power by preventing workers from seeking better or different opportunities. If required, we might be able to provide or solicit more information from those impacted by these clauses.

¹¹

<https://www.health.gov.au/sites/default/files/documents/2021/03/nurses-australia-s-future-health-workforce-reports-detailed-report.pdf>